

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MICHAEL DERRICO,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency..

(CSA 2 331 698)

DOCKET NUMBER
DC831M8610440

DEC 08 1988

DATE: _____

Michael Derrico, White Plains, Maryland, pro se.

Raymond J. Kirk, Washington, D.C., for the agency.

BEFORE

Daniel K. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

Vice Chairman Johnson issues a concurring opinion.

OPINION AND ORDER

The appellant petitioned for review of the initial decision issued on November 13, 1986, that sustained the reconsideration decision in which the Office of Personnel Management (OPM) found that the appellant had been overpaid \$7,090.00 in civil service retirement benefits, granted a partial waiver of \$1,785.00, and denied his request for waiver of the remaining \$5,305.00. On April 15, 1988, the initial decision became the final decision of the Board because there was no majority to alter it. On April 28,

1988, however, the Vice Chairman reopened the initial decision pending appointment of a third Board member.

In accordance with that order, the Board will now consider the appellant's entitlement to waiver of an annuity overpayment. For the reasons set forth below, the Board VACATES the initial decision and REMANDS the case for further adjudication.

BACKGROUND

The appellant was overpaid \$7,090 in civil service retirement benefits from June 1, 1982, through April 30, 1986. In the proceedings below, the appellant requested that collection of the overpayment be waived because recovery would cause him financial hardship.

On reconsideration, OPM waived collection of \$1,785, the amount that had accrued more than 3 years prior to the initial overpayment notice.¹ OPM found that the appellant did not show that recovery of the remainder would cause financial hardship, but adjusted its original recovery schedule from 36 monthly installments of \$196.94 and one installment of \$.16 to 67 monthly installments of \$78.05 and one installment of \$75.65.

An administrative judge with the Board's Washington Regional Office affirmed OPM's reconsideration decision as modified. He found that the Financial Resources Questionnaire (FRQ) completed by the appellant for OPM

¹See *Slater v. Office of Personnel Management*, MSPB Docket No. AT831M8610577, slip op. at 7-8 (December 8, 1989), for an explanation of OPM's 3-year age-of-debt rule.

showed a monthly income of \$1,658.04 and monthly expenses of \$1,337.90. He noted that OPM determined that the appellant had a positive income/expense margin of \$120.14. He also noted that OPM found that several of the monthly expenses listed by the appellant, specifically \$310.90 for utilities, \$217.00 for home repair, etc., and \$231.13 for taxes appeared to have been overstated.

The administrative judge found that the appellant submitted no documentation to support his expenses, and that the particular expenses noted did appear to be inflated. He acknowledged the appellant's assertions that recovery of the overpayment would affect his ability to save money for a car, a vacation, and a new suit, and that he had an unexplained \$500.00 added expense for someone to help him. The administrative judge concluded, however, that the appellant had failed to show that the annuity overpayment should be waived.

The administrative judge did find that the recovery schedule set by OPM could cause the appellant undue financial hardship. Therefore, he concluded that 108 installments of \$49.12 and one installment of \$.04 would be reasonable.

The appellant petitioned for review, challenging the administrative judge's finding that he had not shown that he was entitled to a waiver based on financial hardship. He argued that: His expenses had increased since he submitted his FRQ to OPM; he had personal expenses, such as those for

haircuts and dry cleaning, that were not considered; and his car needed to be replaced.

On July 30, 1987, the Board notified the parties that it was taking official notice pursuant to 5 C.F.R. § 1201.67 of a document published in March 1985 by OPM, entitled *Policy Guidelines on the Disposition of Civil Service Retirement Overpayments (Policy Guidelines)*. See Petition For Review File, Tab 3 (Order dated July 30, 1987). The Board ordered OPM to provide a copy of the *Policy Guidelines* to the appellant within 14 days.² It also ordered the parties to brief the applicability of the *Policy Guidelines* to this case, and it informed them that they could submit objections to the Board's taking official notice of the *Policy Guidelines*.

On August 10, 1987, OPM served a copy of the *Policy Guidelines* on the appellant. He neither filed a brief concerning the *Policy Guidelines* nor filed an objection to the Board's taking official notice of them. OPM has also not filed an objection.

ANALYSIS

The existence and the amount of the overpayment are not in dispute. Nor is it in dispute that the appellant was not at fault in causing the overpayment. The only issue in this

²The Board's order was sent to the appellants and their representatives in approximately 50 pending cases involving various overpayment issues. In each case, OPM was ordered to send a copy of the *Policy Guidelines* to the appellant and his/her representative, if applicable.

case is whether recovery of the overpayment would be against equity and good conscience. See 5 C.F.R. § 831.1401.

Recovery of an overpayment "may not be made from an individual when, in the judgment of the Office of Personnel Management, the individual is without fault and recovery would be against equity and good conscience." 5 U.S.C. § 8346(b). The appellant must prove by substantial evidence that he is entitled to a waiver. 5 C.F.R. § 831.1407(b). Recovery is against equity and good conscience when, among other circumstances,³ it would cause financial hardship to the person from whom it is sought or it would be unconscionable.

1. Determining Whether Recovery Would Cause Financial Hardship

Financial hardship may be deemed to exist in--but is not limited to--those situations where the appellant needs substantially all of his current income and liquid assets to meet current ordinary and necessary living expenses and liabilities. 5 C.F.R. § 831.1404. In *Fusco v. Office of Personnel Management*, MSPB Docket No. PH831M8610647, slip op. at 5-11 (December 8, 1989), the Board set forth a method of analyzing a claim of financial hardship. The first step is to compare monthly income⁴ and monthly

³There is another basis for establishing that recovery of an overpayment would be against equity and good conscience. 5 C.F.R. § 831.1403. That basis, however, is not at issue in this case.

⁴Monthly income is the appellant's monthly income from all sources as stated on the FRQ, including income received by

expenses throughout the period during which collection is scheduled to be made.⁵ To determine the latter, the Board adopted a reasonable person test for deciding whether the type and amount of a miscellaneous expense is ordinary and necessary and whether the amount of an enumerated expense is ordinary and necessary. We held that to meet the reasonable person standard the individual must show by substantial evidence that the amount of the enumerated expenses, and the type and amount of the miscellaneous expenses that he or she claimed are comparable to what a person of ordinary prudence would require under similar circumstances. In doing so, however, we recognized that the discrete circumstances particular to individual situations must be taken into account. See *Fusco*, MSPB Docket No. PH831M8610647, slip op. at 7-10.

The appellant's monthly expenses are therefore calculated by adding the following figures: (1) The appellant's proven ordinary and necessary monthly expenses, including his or her miscellaneous expenses; and 2) \$50.00 for emergency expenses, as allowed by OPM, see *Policy Guidelines* § I.D.9. at 8. This total monthly expense figure

any other family member for whom the annuitant claims ordinary and necessary living expenses. See 5 C.F.R. § 831.1404(a)(2).

⁵The Board has held that it is proper to consider anticipated changes in expenses and income during the projected period of collection. *Eaton v. Office of Personnel Management*, 38 M.S.P.R. 216, 217-18 (1988). To substantiate such changes, the appellant should submit relevant evidence on their nature and extent. See *Clinton v. Office of Personnel Management*, 38 M.S.P.R. 221, 223-24 (1988).

is then subtracted from the appellant's total monthly income to ascertain the appellant's income/expense margin. See *Fusco*, MSPB Docket No. PH831M8610647, slip op. at 10.

Once the income/expense margin is calculated, the Board will consider the annuitant's total financial condition to determine whether recovery would cause financial hardship.⁶ In determining financial hardship, the Board will consider whether, under 5 C.F.R. § 831.1404, the appellant needs substantially all of his current income and liquid assets to meet current ordinary and necessary living expenses and liabilities, so that recovery would cause financial hardship.

2. The Obligation to Request Clarifying Information from the Appellant

In the initial decision, the administrative judge noted that OPM questioned several of the appellant's expenses as "overstated." The administrative judge also noted that the appellant submitted no receipts or other documentation substantiating those expenses, which "appeared to be somewhat inflated," and that the appellant had several other unexplained expense items on the FRQ.

⁶Nonliquid assets generally should not be considered as available for recovery of an overpayment. *Fusco*, slip op. at 6. Further, not all liquid assets should be considered to be available for recovery. *Id.* at 7. While the amount of liquid assets that should not be considered will depend on the individual's overall financial status, \$5,000.00, as a general rule, should ordinarily be considered as unavailable for recovery. *Id.*

The *Policy Guidelines* suggest that, if information on the FRQ appears incorrect or unreasonable, OPM may request clarifying information. See *Policy Guidelines* § I.E.7. at 11. This practice is reasonable and equitable, particularly since annuitants are requested to submit an FRQ to OPM but are not asked to provide documentation corroborating the information on the FRQ.

In this case, the record does not reflect that OPM requested clarifying information from the appellant.⁷ If OPM does not request clarifying information or if the information submitted by the appellant otherwise appears incorrect or unreasonable, the Board's administrative judge should request additional information from the appellant in order to make a finding on the existence of financial hardship or another OPM regulatory basis for waiver asserted by the appellant. See *Clinton v. Office of Personnel Management*, 38 M.S.P.R. 221, 223-24 (1988).

We note, however, that an annuitant must swear or affirm that the information submitted on the FRQ is true, correct, and complete to the best of his or her knowledge and belief. See *Petition For Appeal File*, Tab 3, *Financial Resources Questionnaire* at 3. We find, therefore, that unless there is a specific challenge from OPM or unless the information appears unreasonable or incomplete on its face,

⁷In fact, in its reconsideration decision, OPM did not mention that it was questioning any expenses in the file; rather, OPM's challenge to several expenses appeared only on one of its worksheets.

an appellant should not be required to substantiate his expenses and income.

3. Instructions on Remand Concerning Financial Hardship

Applying the foregoing analysis in the instant case, we find that the administrative judge should consider the appellant's claimed expenses under the reasonable person test after allowing the parties the opportunity to submit relevant evidence. On remand, the administrative judge should allow the appellant to substantiate the expenses questioned above and to submit an updated FRQ and supporting documentation if circumstances have changed substantially since the last FRQ was prepared. The administrative judge should calculate the appellant's income/expense margin and evaluate the appellant's total financial condition, excluding nonliquid assets and an appropriate amount of liquid assets. See n.6, *supra*. Because the Board has taken official notice of the *Policy Guidelines*, the administrative judge should also consider any other relevant provisions of the *Policy Guidelines*, when appropriate.

4. Determining Whether Recovery Would Be Unconscionable

Regardless of whether the appellant shows that recovery of the overpayment would cause financial hardship, he may still be entitled to a waiver if he shows that recovery would be unconscionable. In *Aguon v. Office of Personnel Management*, MSPB Docket No. SF831M8610745, slip op. at 12-16.

(December 8, 1989), the Board discussed the standard that it will apply to determine whether recovery of an annuity overpayment is unconscionable in a given case. It stated that it would consider all relevant factors using a "totality-of-the-circumstances" approach.

The Board found that such circumstances may include cases where there has been an exceptionally lengthy delay by OPM in adjusting an annuity; OPM failed to respond within a reasonable length of time to an annuitant's inquiries regarding an overpayment; OPM failed to act expeditiously to adjust an annuity in the face of specific notice; or OPM was otherwise grossly negligent in handling the case. In addition, it noted that general principles of equity and fairness demand that consideration be given to situations where recovery may be unconscionable because of misinformation given to the annuitant or where personal limitations of the annuitant, including lack of education, physical or mental disability, or other factors, would make collection manifestly unfair. Finally, it stated that unconscionability may be presumed under certain circumstances. See *Aguon*, MPSB Docket No. SF831M8610745, slip op. at 15-16.

In the present case, the appellant has alleged that he suffers from a hiatal hernia, high blood pressure, stomach ulcers, hemorrhoids, and a nervous condition. He further contends that he was operated on for cancer and needs someone to assist him. See Initial Appeal File, Tab 5.

Therefore, we find that the appellant should be given the opportunity on remand to submit evidence and argument showing that his medical condition is sufficient, either alone or combined with other factors, to justify a finding that recovery would be unconscionable. See *Aguon*, MSPB Docket No. SP831M8610745, slip op. at 16.

5. Eligibility for Adjustment of the Repayment Schedule

a. Adjustment Distinguished from Waiver

In the initial decision, the administrative judge found that the appellant failed to show that the overpayment should be waived without making an explicit finding on his claim of financial hardship. Citing *Delange v. Office of Personnel Management*, 30 M.S.P.R. 177 (1986), the administrative judge further found that the recovery schedule set by OPM for 68 installments could cause the appellant undue financial hardship, and therefore adjusted the recovery schedule to 109 monthly installments as reasonable under the circumstances. In *Delange*, however, the Board found that the recovery of the overpayment should be waived because it would cause financial hardship. Thus, the holding in *Delange* does not support the administrative judge's finding that an adjustment, but not a waiver, is appropriate in this case.

While OPM allows for "adjustment of a recovery schedule" by extending the recovery period, it also recognizes that adjustment is not an alternative to waiver.

Section 831.1401 of Title 5, Code of Federal Regulations, provides that, where it has been determined that the appellant is ineligible for a waiver, the appellant is nevertheless entitled to an adjustment in the recovery schedule if he/she shows that it would cause him/her financial hardship to make payment at the rate scheduled. Therefore, the Board must first determine whether the annuitant is eligible for a waiver based on financial hardship or the other criteria in 5 C.F.R. § 831.1403.

If, on remand, the administrative judge determines that, based on the recovery schedule set by OPM, recovery would cause financial hardship because the appellant needs substantially all of his current income and liquid assets to meet current expenses and liabilities, or would be unconscionable under the circumstances, he is entitled to a waiver of the entire overpayment. Under those circumstances, it would be error under 5 C.F.R. § 831.1401 to then adjust the recovery schedule as a means of alleviating the hardship.

Adjustment is available only to those individuals who fail to establish by substantial evidence that they are entitled to a waiver.⁸ If the administrative judge

⁸If an appellant has not shown that recovery would cause financial hardship or be unconscionable and OPM declines to adjust the recovery schedule below, the administrative judge may consider, sua sponte, whether the appellant is entitled to an adjustment. The provisions of 5 C.F.R. § 831.1401 place the issue of an adjustment before OPM in every case in which entitlement to a waiver has not been established. Therefore, the Board does have jurisdiction to consider an entitlement to an adjustment even when it is not raised

determines on remand that the appellant does not need substantially all of his current income and liquid assets to meet current expenses, or that recovery would not be unconscionable, the administrative judge should consider if the appellant has shown a sufficient degree of hardship to entitle him to an adjustment of the recovery schedule set by OPM.⁹

b. OPM's Length-of-Recovery Rule

In this case, the administrative judge extended the recovery period from 68 to 109 installments. This extension is contrary to OPM's length-of-recovery rule, under which a recovery schedule of more than 6 years generally shall not be allowed if the appellant is without fault and submits substantial proof that recovery of the entire debt within 6 years would cause financial hardship. See Policy Guidelines § I.F.5. at 12. This length-of-recovery rule rests on the principle that, generally, it would be unconscionable to attempt to collect that amount of money

before or expressly considered by OPM. Cf. *Autry v. Office of Personnel Management*, 27 M.S.P.R. 130 (1985) (Board does not have jurisdiction to consider arguments not raised before OPM).

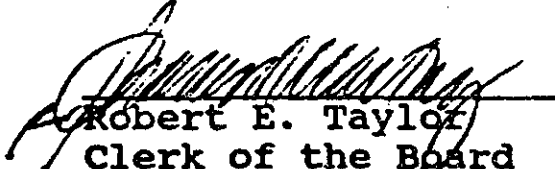
⁹Although there are two kinds of determinations of financial hardship that may be made in a case such as this, i.e., that warranting waiver and that warranting adjustment, 5 C.F.R. § 831.1401 does not explain the distinction between these determinations. The Policy Guidelines recognize that the determinations are similar, but provide that the showing of financial hardship necessary to establish entitlement to an adjustment is not as strict as the showing necessary to establish entitlement to a waiver. See Policy Guidelines § V.C.3. at 23. In considering the appropriateness of an adjustment, the administrative judge should also consider OPM's length-of-recovery rule.

that cannot equitably be collected within 6 years. *Id.* We agree with OPM, and adopt this rule. The amount of the debt that cannot be collected within 6 years should be waived unless OPM shows that the length-of-recovery rule should not apply.¹⁰ If the administrative judge on remand finds that the appellant is entitled only to an adjustment, he should take into consideration the length-of-recovery rule.

ORDER

Accordingly, the case is REMANDED to the Board's Washington Regional Office for further adjudication consistent with this Opinion and Order. On remand, the appellant should be afforded the opportunity to request a hearing.

FOR THE BOARD:

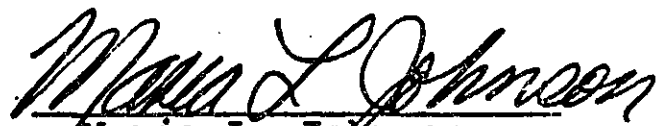

Robert E. Taylor
Clerk of the Board

Washington, D.C.

¹⁰The Policy Guidelines § I.D.11. at 8 provide that a complete FRQ should be sought before a claim of financial hardship may be rejected. The Policy Guidelines § I.F.5. at 12 further provide that a collection schedule may exceed 6 years if the appellant refuses to submit a FRQ to prove that he meets the financial hardship requirements.

CONCURRING OPINION OF VICE CHAIRMAN MARIA L. JOHNSON

I concur in the majority's opinion to remand this case to the Washington D.C. Regional Office for further adjudication. I write separately to note with some amazement the length of time between the date OPM received information from the Social Security Administration of appellant's eligibility for social security benefits and the date OPM notified the appellant of an overpayment. According to the record, the Social Security Administration notified OPM on July 27, 1982, that the appellant was eligible for social security benefits. IAF Tab 3. Approximately eight months later, April 5, 1983, OPM advised the appellant that his annuity would be adjusted. OPM also advised the appellant that due to the large number of pending cases, all the information necessary to recompute his annuity would not be available until fall of 1983. *Id.* However, instead of the expected six-month delay, almost three years elapsed before the appellant was notified that his annuity had been adjusted. At this time the overpayment had grown to \$7,090. *Id.* It would certainly seem that in this computer age, a speedier adjustment could be expected. See my Dissenting Opinion in *Newcomb v. Office of Personnel Management*, MSPB Docket No. SF831M8610210. In the future, I would find delays such as the one in this case to be excessive and a basis for waiver.


(Maria L. Johnson)